Semantan Estate (1952) Sdn Bhd v The Government of Malaysia & Ors and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-01(A)-668–11 OF 2021, W-01(NCvC)(A)-519–08 OF 2024 AND W-01(IM)(NCvC)-646–10 OF 2024

LEE SWEE SENG FCJ, AZIMAH OMAR AND WAN AHMAD FARID JJCA

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Civil Procedure — Enforcement of civil liability — Mandamus — Government acquired plaintiff's land — Plaintiff obtained High Court's order declaring that plaintiff retained beneficial interest in land — Plaintiff applied for mandamus to compel Government to transfer land to plaintiff — Whether High Court's order, being a declarative order, was not amenable to subsequent mandamus to compel Government to transfer land back to plaintiff

Civil Procedure — Government proceedings — Suit against government — Government acquired plaintiff's land — Plaintiff obtained High Court's order declaring that plaintiff retained beneficial interest in land — Application for mandamus against government to transfer land back to plaintiff — Whether mandamus to compel Government to transfer land back to plaintiff was precluded by s 29(1)(b) of the Government Proceedings Act 1956 — Whether s 29(1)(b) of Act 359 should be read in tandem with art 13 of Federal Constitution such that there should be a proper assessment as to what was adequate compensation for acquired land

Land Law — Acquisition of land — Compensation — Whether compensation should be the market value as at the date Government took possession of land or current market value

Land Law — Jurisdiction of the court — General authority of the court — Court's power to make order for transfer of land under s 417 of the National Land Code — Government acquired plaintiff's land — Plaintiff obtained High Court's order declaring that plaintiff retained beneficial interest in land — No declaration by High Court for transfer of land — Plaintiff applied to High Court under s 417 of National Land Code for land to be transferred back to plaintiff — High Court allowed plaintiff's application — Whether High Court's order for transfer of land under s 417 of National Land Code ought to be set aside

The dispute between the parties stemmed from the disagreement in relation to

the compensation for the acquisition of land ('the said land') owned by Semantan Estate (1952) Sdn Bhd ('Semantan Estate') by the State of Selangor. The matter should have resolved by virtue of the High Court's order dated 29 December 2009 for the following: (a) a declaration that Semantan Estate retained its beneficial interest in the said land and was entitled as against the Government of Malaysia ('the Government') to possession thereof; and (b) an order for mesne profits to be assessed for the trespass ('the HC order 2009'). Nonetheless, the dispute between Semantan Estate and the Government continued and led to the following appeals: (i) Civil Appeal No W-01(A)-668–11 of 2021, an appeal by Semantan Estate against the High Court's order in year 2022 in dismissing Semantan Estate's application for mandamus to compel the Government to transfer the subject land to Semantan Estate ('the mandamus appeal'); (ii) Civil Appeal No W-01(NCvC)(A)-519–08 of 2024, an appeal by the Registrar of Titles (Federal Territory) ('the Registrar of Titles') against the order of the High Court in year 2024 ('the s 417 NLC High Court order') obtained by Semantan Estate as the respondent, allowing an application under s 417 of the National Land Code ('the NLC') for the said land to be transferred back to Semantan Estate ('the s 417 NLC appeal'); and (iii) Civil Appeal No W-01(IM)(NCvC)-646–10 of 2024, an appeal by Semantan Estate against the decision of the High Court to stay its order of transfer of the said land until the disposal of the appeal to the Court of Appeal ('the stay appeal'). The issues to be determined by the court in the appeals were: (A) whether the HC order 2009, being a declarative order, was not amenable to a subsequent mandamus to compel the Government to transfer the said land back to Semantan Estate; (B) whether a mandamus to compel the Government to transfer the said land back to Semantan Estate was precluded by s 29(1)(b) of the Government Proceedings Act 1956 ('Act 359'); (C) whether s 29(1)(b) of Act 359 should be read in tandem with art 13 of the Federal Constitution such that there should be a proper assessment as to what was adequate compensation for the said acquired land; (D) whether the compensation should be the market value as at the date the Government took possession of the said land or the current market value; and (E) whether the s 417 NLC High Court order should be set aside.

Held, dismissing the mandamus appeal and remitting the matter back to the High Court for assessment of adequate compensation, allowing the s 417 NLC appeal, dismissing the stay appeal, and ordering each party to bear their own costs:

(1) **(per Lee Swee Seng JCA)** The nature of a declarative order was merely a declaration of rights devoid of any sanction of specific performance; it lacked the characteristic of enforceability required of a judgment that was executable. It had limited utility in that it merely declared legal relationships. Thus, it was clear that with a declarative order, no subsequent mandamus may be issued as it was not executable or

enforceable. A mandamus order may only be issued by the court to compel a public authority to perform a duty it was legally obligated to carry out. In the present case, the HC order 2009 did not order the Government to transfer the said land back to Semantan Estate from the Federal Lands Commissioner, as such, the prayer for a mandamus order could not be maintained (see paras 26 & 28–29).

(2) **(per Lee Swee Seng JCA)** Under s 29(1)(b) of Act 359, there was a clear distinction between the orders that may be made in proceedings by or against the Government as opposed to proceedings between subjects. In plain language, the difference lay in the reality that where recovery of land was concerned, the court may only make an order declaring the subject to be entitled as against the Government to the land or to the possession of it. The court could not make an order for recovery of the land. The court agreed with the Government's submission that there was a limit to the legal recourse available against the Government whereas in the present case, the delivery of land was concerned. There was the broader principle of administrative law that protected public entities from certain types of claims that could disrupt public administration and governmental functions. Not only did the tenets of interpretation of statute did not permit Semantan Estate to argue that s 29(1)(b) of Act 359 was no obstacle to the court granting a mandamus as a follow-up to a declarative order of entitlement to the said land and its possession, but that case law had been consistent in its interpretation of s 29(1)(b) of Act 359 (see paras 32–33 & 45).

(3) **(per Lee Swee Seng JCA)** Whilst s 29(1)(b) of Act 359 was silent on adequate compensation where land was concerned, neither did it prohibit adequate compensation from being payable to the party whose land could not be recovered and transferred back to him. The very fact that there was already in existence the Land Acquisition Enactment then with procedural safeguards to ensure fair market value compensation of land acquired for a public purpose underscored the protection that found its way into art 13 of the Federal Constitution. The court also found its liberty to do so in the light of art 162(6) of the Federal Constitution which enjoined the court to read the provisions of any existing law in operation before Merdeka Day 'with such modifications as may be necessary to bring it into accord with the provisions of the Constitution'. In the light of the preclusion in s 29(1)(b) of Act 359 and the protection of adequate compensation under art 13(2) of the Federal Constitution, the court would make an order for an assessment of adequate compensation for the subject land acquired (see paras 58–59 & 69).

(4) **(per Lee Swee Seng JCA)** There was no double recovery as mesne profits was, essentially in the context of the present case, damages for unlawful occupation of the subject land. It would continue until full and fair

compensation as may be assessed by the court was paid. It could not continue forever and ever and ever (see para 71).

(5) **(per Lee Swee Seng JCA)** The non-pleading of damages in the statement made under O 53 r 3 of the Rules of Court 2012 ('the ROC 2012') was not fatal because at the heart of the claim was the relief of specific performance and in lieu thereof, the court may exercise its discretion to grant damages or compensation instead. It was a case where the claim for a bigger remedy would not foreclose a lesser remedy in damages or compensation (see para 77).

(6) **(per Lee Swee Seng JCA)** Order 53 r 5 of the ROC 2012 could be read in tandem with and harmoniously with O 53 r 2(3) of the ROC 2012 in that under O 53 r 5, the court in granting the reliefs prayed for may further award damages if the claim for damages had been included in the O 53 statement in O 53 r 3(2). The court was not hampered or hindered from making an order for compensation to be assessed as the court would be acting well within the broad ambit of O 53 r 2(3) of the ROC 2012 in doing justice to all manner of men in the context where an opportunity to determine what was adequate compensation under art 13(2) of the Federal Constitution had been denied to Semantan Estate. Alternatively, the court found merits in the senior federal counsel's submission that this was a fit and proper case for the court to invoke its powers under s 69(4) of the Courts of Judicature Act 1964 which expressly empowered the Court of Appeal to make any order and such further or other orders to prevent injustice (see paras 81–82 & 84).

(7) **(per Lee Swee Seng JCA)** Based on s 44 of the Land Acquisition Enactment, the compensation was to be assessed as at the date the Government took possession of the said land. It was at that date that Semantan Estate was deprived of its possession of the said land. That date was 3 December 1956. To have the compensation assessed as at current date would be to reward delay on the part of Semantan Estate. Interest shall be at 6% per annum as stated in s 44 of the Land Acquisition Enactment from 3 December 1956 to date of payment. Upon payment of the compensation as assessed, the mesne profits shall cease to be payable (see paras 88–89 & 94–95).

(8) **(per Lee Swee Seng JCA)** The s 417 NLC application was essentially for an order for the Registrar of Titles (Federal Territory) to transfer the subject land to Semantan Estate free from all encumbrances and liabilities. The application and relief sought was said to be necessary to give effect to the HC order 2009. However, there was no positive order for the transfer of the subject land to Semantan Estate. The only positive order was for assessment of mesne profits for which no further order under s 417 of the NLC was needed or necessary. A subsequent High Court could not read into the HC order 2009 words that were not there

and more so when it was not in the dispositive order as sealed and extracted. In the light of the reasons given above, the s 417 NLC High Court order could not stand (see paras 97 & 102).

(9) **(per Wan Ahmad Farid JCA, supporting)** The learned High Court judge in Appeal No W-01(NCVC)(A)-519–08 of 2024 had fallen into an appealable error that warranted a curial intervention. The learned judge should not have made an order for the said land to be transferred and registered in the name of Semantan Estate when there was no such order stated in the sealed copy of the order dated 29 December 2009 made by Zura Yahya JC, nor was there any clarification sought by Semantan Estate at the material time before the learned judicial commissioner (see para 114).

[Bahasa Malaysia summary

Pertikaian antara kedua-dua pihak berpunca daripada perselisihan faham berhubung dengan pampasan bagi pengambilan tanah ('tanah tersebut') milik Semantan Estate (1952) Sdn Bhd ('Semantan Estate') oleh Negeri Selangor. Perkara tersebut sepatutnya telah diselesaikan menurut perintah Mahkamah Tinggi bertarikh 29 Disember 2009 untuk perkara-perkara berikut: (a) pengisytiharan bahawa Semantan Estate mengekalkan kepentingan benefisialnya dalam tanah tersebut dan berhak terhadap milikan tanah tersebut terhadap Kerajaan Malaysia ('Kerajaan'); dan (b) perintah supaya hasil perantaraan dinilai untuk pencerobohan yang dilakukan ('perintah MT 2009'). Namun begitu, pertikaian antara Semantan Estate dan Kerajaan berterusan dan membawa kepada rayuan-rayuan berikut: (i) Rayuan Sivil No W-01(A)-668–11 Tahun 2021, suatu rayuan oleh Semantan Estate terhadap perintah Mahkamah Tinggi pada tahun 2022 yang menolak permohonan mandamus Semantan Estate bagi memaksa Kerajaan untuk memindahkan kembali tanah tersebut kepada Semantan Estate ('rayuan mandamus'); (ii) Rayuan Sivil No W-01(NCvC)(A)-519–08 Tahun 2024, suatu rayuan oleh Pendaftar Hakmilik (Wilayah Persekutuan) ('Pendaftar Hakmilik') terhadap perintah Mahkamah Tinggi pada tahun 2024 ('perintah s 417 KTN Mahkamah Tinggi') yang diperolehi oleh Semantan Estate sebagai responden, yang membenarkan permohonan di bawah s 417 Kanun Tanah Negara ('KTN') untuk tanah tersebut dipindahkan semula kepada Semantan Estate ('Rayuan s 417 KTN'); dan (iii) Rayuan Sivil No W-01(IM)(NCvC)-646–10 Tahun 2024, suatu rayuan oleh Semantan Estate terhadap keputusan Mahkamah Tinggi untuk menggantung perintah pemindahan tanah tersebut sehingga pelupusan rayuan kepada Mahkamah Rayuan ('rayuan penggantungan'). Isu-isu yang perlu ditentukan oleh mahkamah dalam rayuan-rayuan tersebut adalah: (A) sama ada perintah MT 2009, sebagai perintah deklaratif, tidak boleh tertakluk kepada mandamus yang diperolehi kemudiannya untuk memaksa Kerajaan memindahkan tanah tersebut kembali kepada Semantan Estate; (B) sama ada mandamus untuk

memaksa Kerajaan memindahkan tanah tersebut kembali kepada Semantan Estate dihalang oleh s 29(1)(b) Akta Prosiding Kerajaan 1956 ('Akta 359'); (C) sama ada s 29(1)(b) Akta 359 patut dibaca seiring dengan perkara 13 Perlembagaan Persekutuan supaya ada penilaian yang sewajarnya tentang berapakah pampasan yang mencukupi bagi tanah yang diambil tersebut; (D) sama ada pampasan yang diberikan sepatutnya berdasarkan nilai pasaran pada tarikh Kerajaan mengambil milikan tanah tersebut atau nilai pasaran semasa; dan (E) sama ada perintah s 417 KTN Mahkamah Tinggi patut diketepikan.

Diputuskan, menolak rayuan mandamus dan menyerahkan semula perkara tersebut kepada Mahkamah Tinggi untuk penilaian pampasan yang mencukupi, membenarkan Rayuan 417 KTN, menolak rayuan penggantungan, dan mengarahkan setiap pihak menanggung kos masing-masing:

(1) **(oleh Lee Swee Seng HMR)** Sifat perintah deklaratif hanyalah pengisytiharan hak tanpa apa-apa sekatan pelaksanaan spesifik; ia tidak mempunyai ciri kebolehkuatkuasaan yang diperlukan bagi penghakiman yang boleh dilaksanakan. Ia mempunyai kegunaan terhad kerana ia hanya mengisytiharkan hubungan undang-undang. Oleh itu, adalah jelas bahawa dengan perintah deklaratif, tiada mandamus berikutnya boleh dikeluarkan kerana ia tidak boleh dilaksanakan atau dikuatkuasakan. Perintah mandamus hanya boleh dikeluarkan oleh mahkamah untuk memaksa pihak berkuasa awam melaksanakan tugas yang diwajibkan oleh undang-undang untuk dilaksanakan. Dalam kes semasa, perintah MT 2009 tidak mengarahkan Kerajaan memindahkan tanah tersebut kembali kepada Semantan Estate daripada Pesuruhjaya Tanah Persekutuan, oleh itu, permohonan untuk perintah mandamus tidak dapat dikekalkan (lihat perenggan 26 & 28–29).

(2) **(oleh Lee Swee Seng HMR)** Di bawah s 29(1)(b) Akta 359, terdapat perbezaan yang jelas antara perintah yang boleh dibuat dalam prosiding oleh atau terhadap Kerajaan berbanding prosiding antara subjek-subjek. Dalam bahasa mudah, perbezaannya terletak pada realiti bahawa apabila pertikaian timbul berkenaan tuntutan untuk mendapatkan semula tanah, mahkamah hanya boleh membuat perintah mengisytiharkan subjek yang berkenaan berhak terhadap Kerajaan ke atas tanah tersebut atau milikannya. Mahkamah tidak boleh membuat perintah untuk mendapatkan semula tanah tersebut. Mahkamah bersetuju dengan hujahan Kerajaan bahawa terdapat had untuk tindakan undang-undang yang ada terhadap Kerajaan di mana dalam kes semasa, berkenaan dengan penyerahan tanah. Terdapat prinsip undang-undang pentadbiran yang lebih luas yang melindungi entiti awam daripada jenis tuntutan tertentu yang boleh mengganggu pentadbiran awam dan fungsi kerajaan. Bukan sahaja prinsip tafsiran statut tidak membenarkan Semantan Estate untuk berhujah bahawa s 29(1)(b) Akta 359 tidak menjadi halangan

kepada mahkamah memberikan mandamus sebagai susulan kepada perintah pengisytiharan hak ke atas tanah tersebut dan pemilikannya, tetapi undang-undang kes juga konsisten dalam tafsiran s 29(1)(b) Akta 359 (lihat perenggan 32–33 & 45). A

(3) **(oleh Lee Swee Seng HMR)** Walaupun s 29(1)(b) Akta 359 tidak menyatakan apa-apa mengenai pampasan yang mencukupi berkenaan dengan tanah, ia juga tidak melarang pampasan yang mencukupi daripada dibayar kepada pihak yang tanahnya tidak dapat diperoleh semula dan dipindahkan semula kepadanya. Hakikat bahawa sudah wujud Enakmen Pengambilan Tanah pada masa itu dengan perlindungan prosedur untuk memastikan pampasan nilai pasaran yang adil bagi tanah yang diambil untuk tujuan awam menggariskan perlindungan seperti yang diperuntukkan dalam perkara 13 Perlembagaan Persekutuan. Mahkamah juga mendapat kebebasan untuk berbuat demikian berdasarkan perkara 162(6) Perlembagaan Persekutuan yang memerintahkan mahkamah membaca peruntukan mana-mana undang-undang sedia ada yang berkuat kuasa sebelum Hari Merdeka 'dengan apa-apa ubah suaian yang perlu untuk menyelaraskannya dengan peruntukan Perlembagaan'. Berdasarkan larangan dalam s 29(1)(b) Akta 359 dan perlindungan pampasan yang mencukupi di bawah perkara 13(2) Perlembagaan Persekutuan, mahkamah akan membuat perintah untuk penilaian pampasan yang mencukupi bagi tanah yang diambil tersebut (lihat perenggan 58–59 & 69). B C D E

(4) **(oleh Lee Swee Seng HMR)** Tidak terdapat tuntutan berganda kerana hasil perantaraan, pada asasnya dalam konteks kes semasa, ganti rugi untuk pendudukan yang menyalahi undang-undang ke atas tanah subjek. Ia akan berterusan sehinggalah pembayaran pampasan penuh dan adil sebagaimana yang mungkin dinilai oleh mahkamah. Ia tidak boleh berterusan selama-lamanya (lihat perenggan 71). F G

(5) **(oleh Lee Swee Seng HMR)** Kegagalan memplid ganti rugi dalam pernyataan yang dibuat di bawah A 53 k 3 Kaedah-Kaedah Mahkamah 2012 ('KKM 2012') tidak memudaratkan kerana inti pati tuntutan tersebut adalah relief pelaksanaan spesifik dan sebagai galang gantinya, mahkamah sebaliknya boleh menggunakan budi bicaranya untuk memberikan ganti rugi atau pampasan. Ia adalah kes di mana tuntutan untuk remedi yang lebih besar tidak akan menafikan remedi yang lebih rendah dalam ganti rugi atau pampasan (lihat perenggan 77). H

(6) **(oleh Lee Swee Seng HMR)** Aturan 53 k 5 KKM 2012 boleh dibaca selaras dengan dan secara harmoni dengan A 53 k 2(3) KKM 2012 di mana di bawah A 53 k 5, mahkamah dalam memberikan relif yang dipohon boleh memberikan ganti rugi selanjutnya jika tuntutan ganti rugi telah dimasukkan dalam pernyataan A 53 di bawah A 53 k 3(2). I

Mahkamah tidak dilarang atau dihalang daripada membuat perintah supaya pampasan dinilai kerana mahkamah telah bertindak dengan sewajarnya di dalam lingkungan luas A 53 k 2(3) KKM 2012 dalam memberi keadilan kepada semua jenis individu dalam konteks di mana peluang untuk menentukan pampasan yang mencukupi untuk Semantan Estate di bawah perkara 13(2) Perlembagaan Persekutuan telah dinafikan. Sebagai alternatif, mahkamah bersetuju dengan hujahan peguam kanan persekutuan bahawa ini adalah kes yang sesuai dan wajar bagi mahkamah menggunakan kuasanya di bawah s 69(4) Akta Mahkamah Kehakiman 1964 yang secara nyata memberi kuasa kepada Mahkamah Rayuan untuk membuat apa-apa perintah dan perintah selanjutnya atau perintah lain untuk mencegah ketidakadilan (lihat perenggan 81–82 & 84).

(7) **(oleh Lee Swee Seng HMR)** Berdasarkan s 44 Enakmen Pengambilan Tanah, pampasan akan dinilai pada tarikh Kerajaan mengambil milikan tanah tersebut. Ia berlaku pada tarikh Semantan Estate dilucutkan hak miliknya ke atas tanah tersebut. Tarikh tersebut ialah 3 Disember 1956. Jika pampasan dinilai pada tarikh semasa, ia akan berjumlah kepada memberi ganjaran di atas kelewatan di pihak Semantan Estate. Faedah hendaklah pada kadar 6% setahun mulai 3 Disember 1956 hingga tarikh pembayaran seperti yang dinyatakan dalam s 44 Enakmen Pengambilan Tanah. Selepas pembayaran pampasan seperti yang dinilai, hasil perantaraan hendaklah berhenti dibayar (lihat perenggan 88–89 & 94–95).

(8) **(oleh Lee Swee Seng HMR)** Permohonan s 417 KTN pada asasnya adalah untuk perintah agar Pendaftar Hakmilik (Wilayah Persekutuan) memindahkan tanah tersebut kepada Semantan Estate bebas daripada semua sekatan dan liabiliti. Permohonan dan relif yang dipohon tersebut dikatakan perlu untuk menguatkuasakan perintah MT 2009. Bagaimanapun, tiada perintah positif untuk pemindahan tanah tersebut kepada Semantan Estate. Satu-satunya perintah positif adalah untuk penilaian hasil perantaraan yang tidak memerlukan perintah lanjut di bawah s 417 KTN. Mahkamah Tinggi yang berikutnya tidak boleh membaca ke dalam perintah MT 2009 perkataan-perkataan yang tidak ada dan lebih-lebih lagi apabila ia tidak ada dalam perintah dispositif seperti yang dimeterai dan diekstrak. Berdasarkan alasan-alasan yang diberikan di atas, perintah s 417 KTN Mahkamah Tinggi tidak dapat dipertahankan (lihat perenggan 97 & 102).

(9) **(oleh Wan Ahmad Farid HMR, menyokong)** Hakim Mahkamah Tinggi yang bijaksana dalam Rayuan No W-01(NCVC)(A)-519–08 Tahun 2024 telah melakukan kekhilafan yang boleh dirayu yang memerlukan campur tangan Mahkamah Rayuan. Hakim yang bijaksana tidak sepatutnya membuat perintah supaya tanah tersebut dipindah

milik dan didaftarkan atas nama Semantan Estate apabila tidak ada perintah sedemikian yang dinyatakan dalam salinan termeterai perintah bertarikh 29 Disember 2009 yang dibuat oleh Zura Yahya PK, dan tiada apa-apa penjelasan diminta oleh Semantan Estate pada masa yang material di hadapan pesuruhjaya kehakiman yang bijaksana (lihat perenggan 114).]

Cases referred to

Assa Singh v Mentri Besar, Johore [1969] 2 MLJ 30, FC (refd)
Bayangan Sepadu Sdn Bhd v Jabatan Pengairan dan Saliran Negeri Selangor & Ors [2021] 1 MLJ 322, CA (refd)
Bayangan Sepadu Sdn Bhd v Jabatan Pengairan dan Saliran Negeri Selangor & Ors [2022] 1 MLJ 701, FC (refd)
Empayar Canggih Sdn Bhd v Ketua Pengarah Bahagian Penguatkuasa Kementerian Perdagangan Dalam Negeri dan Hal Ehwal Pengguna Malaysia & Anor [2018] supp MLJ 16, FC (refd)
Kelana Megah Development Sdn Bhd v Kerajaan Negeri Johor and another appeal [2016] MLJU 1649; [2016] 8 CLJ 804, CA (refd)
Kerajaan Malaysia v Semantan Estates (1952) Sdn Bhd [2019] 2 MLJ 609; [2019] 2 CLJ 145, FC (refd)
Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors [2005] 6 MLJ 289, CA (refd)
Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano [1997] 1 MLJ 94, FC (folld)
Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd [2008] 4 MLJ 641, FC (refd)
Ng Kim Moi (P) & Ors v Pentadbir Tanah Daerah, Seremban, Negeri Sembilan Darul Khusus (Negeri Sembilan Township Sdn Bhd & Anor, proposed intervenors) [2004] 3 MLJ 301, CA (refd)
Orchard Circle Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat & Ors [2021] 1 MLJ 180, FC (refd)
Pemungut Hasil Tanah Daerah Barat Daya, Penang v Kam Gin Paik & Ors [1986] 1 MLJ 362, PC (refd)
Pemungut Hasil Tanah, Daerah Barat Daya (Balik Pulau), Pulau Pinang v Kam Gin Paik & Ors [1983] 2 MLJ 390, FC (refd)
PP v Azmi bin Sharom [2015] 6 MLJ 751; [2015] 8 CLJ 921, FC (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147, FC (refd)
Ramamoorthy v Mentri Besar of Selangor & Anor [1971] 1 MLJ 187, FC (refd)
Semantan Estate (1952) Sdn Bhd v Collector of Land Revenue Wilayah Persekutuan [1987] 2 MLJ 346; [1987] CLJ Rep 329, SC (refd)
Semantan Estate (1952) Ltd v Collector of Land Revenue [1960] 1 MLJ 300 (refd)
Semantan Estate (1952) Sdn Bhd v Kerajaan Malaysia & Ors [2022] MLJU 233; [2022] 5 CLJ 446, HC (refd)

Semantan Estates (1952) Sdn Bhd v Kerajaan Malaysia [2010] MLJU 2174; [2011] 2 CLJ 257, HC (refd)
Semantan Estate (1952) Sdn Bhd v The Registrar of Titles [2024] 12 MLJ 807, HC (refd)
Stone World Sdn Bhd v Engareh (M) Sdn Bhd [2020] 12 MLJ 237, FC (refd)
Superintendent of Land and Survey Department Kuching-Divisional Office & Anor v Ratnawati bt Hasbi Mohamad Suleiman [2020] 2 MLJ 553, FC (folld)
Superintendent of Lands and Surveys, Kuching Division & Ors v Kuching Waterfront Development Sdn Bhd [2009] 5 MLJ 607, CA (refd)
Takako Sakao (f) v Ng Pek Yuen (f) & Anor (No 3) [2010] 2 MLJ 141; [2010] 1 CLJ 429, FC (refd)
The Government of Malaysia v Semantan Estate (1952) Sdn Bhd [2012] MLJU 1747; [2012] CLJU 635, CA (refd)
Tun Dr Mahathir bin Mohamad v Tan Sri Mohd Sidek bin Hassan & Ors [2018] 7 MLJ 768, HC (refd)
Wong Kee Sing Reality Sdn Bhd & Ors v The Collector of Land Revenue, District of Gombak [1995] MLJU 187; [1995] 1 CLJU 363, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 25(2), 69(4), (5)
Crown Proceedings Act 1947 [UK] s 21
Federal Constitution arts 5, 5(3), (4), 6, 7, 8, 9, 10, 11, 12, 13, 13(2), 162(6)
Government Proceedings Act 1956 s 29, 29(1)(b)
Government Proceedings Ordinance 1956 s 29, 29(1)(b)
Industrial Relations Act 1967 s 20(1)
Land Acquisition Act 1960
Land Acquisition Enactment ss 3(1), 44
National Land Code s 417
Optical Disc Act 2000
Public Authorities Protection Act 1948 s 2(a)
Restricted Residence Enactment (Cap 39 of the Laws of the Federated Malay States)
Rules of Court 2012 O 53, O 53 rr 2(3), 3, 3(2), 5
Rules of the Federal Court 1995 r 137
Rules of the High Court 1980 (repealed by Rules of Court 2012) O 53, O 53 r 5
Specific Relief Act 1950 ss 8, 8(3), 18(2)

Appeal from: *Semantan Estate (1952) Sdn Bhd v The Registrar of Titles* [2024] 12 MLJ 807 (High Court, Kuala Lumpur)

Cyrus Das (with Ira Biswas, Janet Chai Pei Ying, Alexie Ng Ying Ching and Abraham Kuah Juhn Wei) (Chooi & Co) for the appellant.

Shamsul bin Bolhassan (with Ahmad Hanir Hambaly @ Aruwi, Nurhafizza Azizan, Liew Horng Bin, Saravanan Kuppusamy and Nuur Zul Izzati Zulkipli) (Attorney General's Chambers) for the respondents.

Lee Swee Seng FCJ:

[1] This is a land acquisition matter, which through the default of the parties, has dragged on for some close to 70 years. The problem started in 1956, long before most of us were born. The parties had agreed on the subject land of about 250 acres in the Mukim of Batu to be acquired by the Selangor State then for a public purpose but could not agree on the compensation sum. The Government then paid what the Collector of Land Revenue awarded based on RM5,282 per acre but the owner, Semantan Estate (1952) Sdn Bhd ('Semantan Estate') wanted RM13,000 per acre.

[2] In the meanwhile, Semantan Estate accepted the sum of RM1,320,500 paid by the Government on 21 December 1956 and another RM79,241.01 on 3 February 1959 without prejudice to its claiming for what it said is the fair compensation. The additional compensation was based on an additional area after resurvey making the total of 263.272 acres where the subject land is concerned.

[3] When there was an impasse on further compensation, the land owner did what everyone thought could be properly done which was to refer the matter to the High Court by way of a land reference under the then Land Acquisition Enactment (Cap 140).

[4] The High Court had a different view and held that as the land area was different from that which was stated in the *Gazette* notification and that parties cannot waive procedural irregularities in order to invoke the jurisdiction of the High Court pursuant to a land reference, the High Court declined jurisdiction. See *Semantan Estate (1952) Ltd v Collector of Land Revenue* [1960] 1 MLJ 300 ('Semantan Estate High Court GOJ 1960').

[5] What happened subsequently had been lost to some extent with the passage of time. What we can glean from the records was that the government had taken possession of the land on 3 December 1956 with the title being issued subsequently in the name of the Federal Lands Commissioner.

[6] Through the years the land was transformed by the government from a rubber estate to a thriving township with roads, flyover, buildings, facilities and infrastructure.

[7] The second significant event was an ex parte leave application filed by

Semantan Estate on 9 August 1983 which leave for a mandamus to compel the Collector of Land Revenue to complete the acquisition process was granted on 8 December 1983. The High Court upon hearing the parties struck out the originating motion for mandamus on ground that it was barred by s 2(a) of the Public Authorities Protection Act 1948 ('the PAPA 1948').

[8] On appeal the Supreme Court in its judgment reported in *Semantan Estate (1952) Sdn Bhd v Collector of Land Revenue Wilayah Persekutuan* [1987] 2 MLJ 346; [1987] CLJ Rep 329 ('Semantan Estate Supreme Court GOJ 1987') held that mandamus would not be issued when the owner had not exhausted its right of appeal then against the High Court order. In any event where the delay is long, mandamus will not be issued. In doing so it affirmed the decision of the High Court and dismissed the appeal.

[9] Semantan Estate filed a writ action in the High Court on 2 March 1989 vide High Court D4-21–4–89 for: (1) a declaration that it retained its beneficial interest in the 263.272 acres of land of which the Government has through its servants and/or agents taken unlawful possession of and that it is entitled as against the Government to possession thereof; (2) mesne profits as damages for trespass; and (3) costs. The writ action was struck out by the High Court and Semantan Estate appealed to the Supreme Court and the Federal Court on 3 October 1994 allowed its appeal and set aside the order of the High Court.

[10] Semantan Estate filed a fresh writ action in 2003 in High Court Civil Suit No S7–21–213 of 2003 ('the High Court 2003 declaration suit') and succeeded on 29 December 2009 in getting a declaration that it retained its beneficial interest in the subject land and was entitled as against the Government to possession thereof. There was also an order for mesne profits to be assessed for the trespass ('the High Court declaration order 2009'). See the High Court case of *Semantan Estates (1952) Sdn Bhd v Kerajaan Malaysia* [2010] MLJU 2174; [2011] 2 CLJ 257 ('Semantan Estate High Court GOJ 2011').

[11] The decision was affirmed on appeal by the Court of Appeal on 18 May 2012 in Civil Appeal No W-01–61 of 2010. See the Court of Appeal's judgment in *The Government of Malaysia v Semantan Estate (1952) Sdn Bhd* [2012] MLJU 1747; [2012] CLJU 635 ('Semantan Estate Court of Appeal GOJ 2012').

[12] Leave to appeal to the Federal Court in Civil Leave Application No 08–478–06 of 2012 was dismissed on 21 November 2012. There was also an application filed on 28 November 2016 vide Civil Application No 08(F)-607–11 of 2016 (W) by the Government to review the dismissal by

the Federal Court of the leave application and that too was dismissed. See the decision of the Federal Court in *Kerajaan Malaysia v Semantan Estates (1952) Sdn Bhd* [2019] 2 MLJ 609; [2019] 2 CLJ 145 ('Semantan Estate Federal Court GOJ 2019').

[13] The assessment of damages for mesne profits proceeded slowly and sporadically as there were meetings held between the parties to explore an amicable settlement. When it does not look like there was going to be any settlement, Semantan Estate filed a judicial review application in February 2017, this time for a mandamus ('the mandamus application') to compel the Government to transfer the subject land back to Semantan Estate. The High Court dismissed the said mandamus application in 2022 ('the HC order 2022'). See the High Court case of *Semantan Estate (1952) Sdn Bhd v Kerajaan Malaysia & Ors* [2022] MLJU 233; [2022] 5 CLJ 446 ('Semantan Estate High Court GOJ 2022').

[14] There was also another Originating Summons No WA-24NCVC-301–02 of 2017 ('the s 417 of the NLC OS') against the seventh respondent in February 2017 for an order for the Registrar of Titles to transfer the title to the subject land back to Semantan Estate pursuant to s 417 of the National Land Code ('the NLC') based on the 2009 order. The High Court allowed for an order to transfer the subject land back to Semantan Estate as a necessary consequence of the 2009 order of the High Court ('the High Court order 2024'). See the High Court case of *Semantan Estate (1952) Sdn Bhd v The Registrar of Titles* [2024] 12 MLJ 807 ('Semantan Estate High Court GOJ 2024').

BEFORE THE COURT OF APPEAL

[15] There are three appeals pending before us. Appeal in Civil Appeal No W-01(A)-668–11 of 2021 ('the mandamus appeal') is the appeal of Semantan Estate against the Government of Malaysia and six other respondents (collectively called the 'Government') is the appeal of Semantan Estate against the High Court order 2022 dismissing its order for a mandamus to compel the Government to transfer the subject land to Semantan Estate.

[16] The other appeal in Civil Appeal No W-01(NCvC)(A)-519–08 of 2024 ('the s 417 of the NLC appeal') is the appeal by the Registrar of Titles (Federal Territory) ('Registrar of Titles') against the High Court order 2024 obtained by Semantan Estate as the respondent, allowing a s 417 of the NLC application for the said subject land to be transferred back to Semantan Estate.

[17] The third appeal in W-01(IM)(NCvC)-646–10 of 2024 was by the Semantan Estate ('the stay appeal') against the decision of the High Court to stay its order of transfer of the subject land until the disposal of the appeal to the Court of Appeal.

[18] By consent of the parties, all the three appeals were heard together as the issues straddle each other and the decision of this Court of Appeal in one appeal will have a consequential effect on the outcome of the other two appeals.

[19] The main ground of appeal in the mandamus appeal is that the High Court erred in refusing to grant the mandamus when, reading the Semantan Estate High Court GOJ 2011 as a whole, a mandamus is the necessary remedy in the light of the finality of the High Court declaration order 2009.

[20] As for the s 417 of the NLC appeal, the Registrar of Titles appealed primarily on the overreach of the High Court declaration order 2009 and indirectly granting the mandamus order when another High Court had dismissed it in the mandamus application.

[21] As for the stay appeal it was mainly on the ground that there was no special circumstance justifying a stay and that the stay rendered the High Court declaration order 2009 ineffective.

Whether the High Court order 2009, being a declarative order, is not amenable to a subsequent mandamus to compel the Government to transfer the subject land back to Semantan Estate

[22] The powers of the High Court to grant a mandamus order is provided under the Courts of Judicature Act 1964 where its s 25(2) reads:

> (2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule:
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> Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same issue.

[23] Paragraph 1 of the Schedule in turn provides:

> *1. Prerogative writs*
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> Power to issue to any person or authority direction, orders or writs, including writs of the nature of habeas corpus, *mandamus*, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose. (Emphasis added.)

[24] Where there is a positive order on the part of the Government or its agencies to discharge its duty, the court shall not hesitate to grant a mandamus

order as was held by the Federal Court in *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd* [2008] 4 MLJ 641 as follows:

> [92] From the above, the position of the law is that, there is a duty on the part of the government to pay the amount stated in the certificate issued under s 33(3) of the GPA to the respondent. It is not a matter of discretion for the government whether to pay or not to pay. As a statutory duty it is of course binding on the state government. And it is incumbent upon the court to give effect to such statutory duty and if necessary through the coercive force of the order of mandamus.

[25] In the mandamus application, Semantan Estate sought orders of mandamus against the Government to compel it to comply with the High Court order 2009 which it had obtained in its favour in the High Court 2003 declaration suit as follows: The High Court order 2009 is reproduced below:

(a) Semantan Estate retained its beneficial interest in the 263.272 acres of the land held under CT 17038 Mukim of Batu (formerly part of the land known as Lot 4647 comprised in CT 12530) ('the subject land') of which the Government has through its servants and/or agents taken unlawful possession of and that Semantan Estate is entitled against the Government to possession thereof ('Order No 1');

(b) that the Government do pay the Semantan Estate mesne profits as damages for trespass, to be assessed by the Senior Assistant Registrar ('Order No 2'); and

(c) that the Government do pay costs to Semantan Estate forthwith ('Order No 3').

[26] To be sure the High Court order 2009 did not order the Government to transfer the subject land back to Semantan Estate from the Federal Lands Commissioner. As such there was no order to execute in the absence of an order for the transfer of the land back to Semantan Estate. An order for declaration cannot be executed as it is only declarative of the rights of the parties.

[27] The mandamus application of Semantan Estate as the appellant with respect to the reliefs sought are set out in full below for an appreciation of its scope and ambit:

> (a) An order of mandamus to compel the Respondents to take and cause all necessary steps to be taken to give effect to Order No. 1 of the High Court Judgment which is reproduced as follows:
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> > The Plaintiff retained its beneficial interest in the 263.272 acres of the land held under CT 17038 Mukim of Batu (formerly part of the land known as Lot 4647 comprised in C.T 12530) of which the Defendant has through its servants and/or agents taken unlawful possession of and that the Plaintiff is entitled as against the Defendant to possession thereof;

(b) An order(s) of mandamus to compel the Respondents to:

(i) Transfer and cause to be transferred the Land to the Appellant free of encumbrances and liabilities, including but not limited to registering the Appellant as the proprietor of the Land;

(ii) Take and cause all necessary steps to be taken to register the Appellant as the proprietor of the Land, free of encumbrances and liabilities;

(iii) Execute and cause to be executed all instruments of transfer necessary to effect a transfer of the Land free of encumbrances and liabilities to the Appellant;

(iv) Issue or cause to be issued the issue document of title to the Land free of encumbrances and liabilities in the name of the Appellant;

(v) Prepare, change, cancel, delete, correct, and/or amend the relevant register document(s) of title, issuing document(s) of title or any other register or instrument relating to the Land, including any memorial or entry in the relevant register of titles and documents so as to vest the registered proprietorship in the Land free of encumbrances in the name of the Appellant; and

(vi) Return, cause to be returned and make all necessary directions, arrangements, preparations and/or take all necessary action in respect of returning and handing over possession of the Land to the Appellant as the lawful proprietor and owner of the Land.

(c) That the costs of the mandamus application be borne and paid by the Respondents.

(d) Such further orders and/or other reliefs that this Honourable Court deems fit, just and proper to be granted.

[28] The nature of a declarative order is merely a declaration of rights devoid of any sanction of specific performance; it lacks the characteristic of enforceability required of a judgment that is executable. It has limited utility in that it merely declares legal relationships. See the Federal Court case of *Takako Sakao (f) v Ng Pek Yuen (f) & Anor (No 3)* [2010] 2 MLJ 141; [2010] 1 CLJ 429. The Federal Court explained as follows:

> [6] There is an added point in so far as staying the effect of the principal judgment is concerned. All that judgment does, inter alia, is to hold that the appellant is a beneficiary under a constructive trust of which the second respondent is a trustee. In short it declares the existence of a constructive trust. It makes no positive order. The weakness of the remedy of declaration lies in the want of its enforceability. A declaration cannot be enforced by execution. In *Prakash Chand v Grewal* [1975] Cri LJ 679, the court held as follows:
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> > A declaratory decree cannot be executed as it only declares the rights of the decree-holder qua the judgement-debtor and does not, in terms, direct the judgement-debtor to do or to refrain from doing any particular act or things. Since there is no command issued to the judgement-debtor to obey, the civil

process cannot be issued for the compliance of that mandate or command. A

In other words, there can be no committal or other execution process issued to enforce a declaration. Since a declaration cannot be enforced, no question of staying it may arise.

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[29] Thus, it is clear that with a declarative order, no subsequent mandamus may be issued as it is not executable or enforceable. A mandamus order may only be issued by the court to compel a public authority to perform a duty it is legally obligated to carry out. See the Federal Court case of the *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd* [2008] 4 MLJ 641. Absent C a specific order directing the Government to transfer the subject land back to Semantan Estate, the prayer for a mandamus order cannot be maintained

Whether a mandamus to compel the Government to transfer the subject land back to Semantan Estate is precluded by s 29(1)(b) of the Government Proceedings Act 1956 D

[30] Our s 29 of the Government Proceedings Act 1956 ('the GPA 1956') was taken from the equivalent provision of the UK in s 21 of their Crown Proceedings Act 1947. It reads as follows: E

29 Nature of relief

(1) In any civil proceedings by or against the Government the court shall, subject to this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require: F

Provided that —

(a) where in any proceedings against the Government any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an G order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and

(b) in any proceedings against the Government for the recovery of land or other property *the court shall not make an order for the recovery of the land or the delivery of the property*, but may in lieu thereof *make an order declaring that the plaintiff is entitled as against the Government to the land or property* or to the possession thereof. H

(2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could I not have been obtained in proceedings against the Government. (Emphasis added.)

[31] There is also the corresponding provision in s 8 of the Specific Relief Act 1950 ('the SRA') which gives the right to sue if one is dispossessed from one's

land. However, s 8(3) removes that right to sue as against the Government as follows:

> 8 Suit by person dispossessed of immovable property
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> (1) If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in the suit.
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> (2) Nothing in this section shall bar any person from suing to establish his title to any such property and to recover possession thereof.
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> (3) *No suit under this section shall be brought against any Government in Malaysia.* (Emphasis added.)

[32] Section 29(1)(b) of the GPA 1956 is what it says it is. There is a clear distinction between the orders that may be made in proceedings by or against the Government as opposed to proceedings between subjects. In plain language, the difference lies in the reality that where recovery of land is concerned, the court may only make an order declaring the subject to be entitled as against the Government to the land or to the possession of it. The court cannot make an order for recovery of the land.

[33] We agree with the Government's submission that there is a limit to the legal recourse available against the Government whereas in this case, the delivery of land is concerned. There is the broader principle of administrative law that protects public entities from certain types of claims that could disrupt public administration and governmental functions.

[34] The rationale is not difficult to find. One can imagine the horrendous consequences if, for instance in this case, after some close to 70 years, an order is given for the subject land to be transferred back to Semantan Estate. What is on the subject land before, in December 1956 when the Government took possession of it were just old rubber trees. Now it is part of a fully developed township where there are various government buildings housing various facilities that serve the public including the Syariah Courts, the Immigration Department, a mosque, a hockey stadium and a national archive, to mention but a few. There is also a system of roads, highways and flyovers serving the public and connecting it with the surrounding areas, all developed and continue to be developed.

[35] An order for recovery and transfer of the subject land would not just result in the transfer of ownership of the buildings and infrastructures on the subject land to Semantan Estate but that Semantan Estate as part of the incidents of proprietorship would be able to prevent the public of entering the subject land and the buildings therein and even using the roads. There is also

nothing preventing them from fencing off the whole area and charging a license fee or a toll for anyone who want to pass through it.

[36] We see where Semantan Estate is coming from in that, if allowed by the law, they would want the Government to transfer back the subject land to them and the Government may then acquire the subject land the next day but it would be at the current market value. It does not matter if it is the Government itself that had set aside tons of money to develop the subject land to what it is today. The stand of Semantan Estate is that even if the Government would have to pay through its nose, that is the price it has to pay as the court has declared the acquisition to be unlawful.

[37] With the greatest of respect to learned counsel for Semantan Estate, the law as embodied in s 29(1)(b) of the GPA 1956 does not permit that Gill FCJ in *Ramamoorthy v Mentri Besar of Selangor & Anor* [1971] 1 MLJ 187 (FC) commented that provisos of s 29 of the Government Proceedings Ordinance 1956 (the predecessor of s 29 of the GPA 1956) 'are sufficiently clear so as to leave no room for argument to the contrary'.

[38] The Federal Court had the opportunity to address the applicability of the then s 29(1)(b) of the Government Proceedings Ordinance 1956 in *Pemungut Hasil Tanah, Daerah Barat Daya (Balik Pulau), Pulau Pinang v Kam Gin Paik & Ors* [1983] 2 MLJ 390 where Justice Hashim Yeoh A Sani FCJ (as he then was) said categorically as follows:

> Having regard to the express provision of s 29(1)(b) of the Government Proceedings Ordinance 1956 can the court at all make an order of repossession of the lands against the Government? In *Underhill & Another v Ministry of Food* [1950] 1 All ER 591 the corresponding section in the Crown Proceedings Act, 1947 of the United Kingdom came to be examined. Romer J said that it was quite plain that insofar as the motion was founded on a claim for injunction the court had no jurisdiction to entertain it by virtue of s 21(1)(a) of the Act. That case was brought by motion before the court asking for an injunction. In opening the case counsel for the plaintiffs said that he was going to ask for an alternative form of relief namely a declaration instead of an injunction in view of s 21 of the Crown Proceedings Act, 1947. Section 29(1)(a) was also examined in *Ramamoorthy v Mentri Besar of Selangor & Anor* [1971] 1 MLJ 187 and Gill FCJ as then was, said that the provisions of s 29 are 'sufficiently clear so as to leave no room for argument'.
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> In our opinion the purpose of s 29 of the Government Proceedings Ordinance 1956 is plain enough and that it enables the court to make declarations of the rights of parties where one of the parties is the Government.
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> It is very clear from the language of s 29 that subject to two exceptions, the court may make any such order against the Government as it may make against a subject.

> First, an injunction or *order for specific performance may not be granted against the Government, but the court may instead make an order declaratory of the rights of the parties.*
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> Secondly, *an order for the recovery of land* or the delivery of property. *may not be made against the Government, but in lieu thereof the court may make an order declaring the plaintiff to be entitled as against the Government to the land* or the property or to the possession thereof. Therefore *the order of the learned judge directing the Collector to deliver possession of the land in question is contrary to the express provision of s 29(1)(b) of the Government Proceedings Ordinance 1956.* (Emphasis added.)

[39] The Privy Council hearing the appeal from the Federal Court in *Pemungut Hasil Tanah Daerah Barat Daya, Penang v Kam Gin Paik & Ors* [1986] 1 MLJ 362 was even more explicit to the letter when it ordered as follows:

> ... s 29(1)(b) of the Government Proceedings Ordinance 1956, precludes an order being made against the Government, whose servant the appellant is, for the recovery of the land. The Federal Court rightly set aside that part of the order of the trial judge which ordered the appellant to deliver possession of the lands back to the respondents. What the Federal Court should however have gone on to do was *to make an order in terms of s 29(1)(b) of the Ordinance declaring that the respondents were entitled as against the appellants to possession of the land ...* (Emphasis added.)

[40] The relief prayed for by Semantan Estate in the High Court 2003 declaration suit was clearly abiding by what was precluded as well as permitted under s 29(1)(b) of the GPA 1956. The prayers stopped short of an order to recover the subject land in keeping with the restraint that 'the court shall not make an order for the recovery of the land'.

[41] Semantan Estate prayed for what was permitted which is that the court 'in lieu thereof make an order declaring that the plaintiff is entitled as against the Government to the land'. One can say that the relief prayed for were enlightened by the Federal Court's decision and the Privy Council's decision in *Kam Gin Paik*'s case. Indeed, the first limb of the High Court order 2009 engaged the same wordings as the provision of s 29(1)(b) of the GPA 1956. It is not a coincidence but a careful choice to comply with the constrictions contained in the proviso itself.

[42] Semantan Estate's stand is that while they may be restrained by s 29(1)(b) of the GPA 1956 they are not restricted where the ramifications of their declarative prayers are concerned; the consequences are the same though their prayers are constricted and confined to a declaration of being entitled to the subject land.

[43] However, Parliament does not legislate in vain and words are not for decorative purpose when used in a legislation. The words mean what they say that 'the court shall not make an order for the recovery of the land'. We cannot denude the plain and peremptory words of prohibition into a permission. We hearken to the well-established principle of statutory interpretation as enunciated by the Federal Court in *Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano* [1997] 1 MLJ 94 where it held that:

> ... The function of a court when construing an Act of Parliament is to interpret the statute in order to ascertain legislative intent primarily by reference to the words appearing in the particular enactment Prima facie, every word appearing in an Act must bear some meaning. For Parliament does not legislate in vain by the use of meaningless words and phrases. A judicial interpreter is therefore not entitled to disregard words used in a statute or subsidiary legislation or to treat them as superfluous or insignificant It must be borne in mind that:
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> > As a general rule a court will adopt that construction of a statute which will give some effect to all of the words which it contains, (per Gibbs J in *Beckwith v R* (1976) 12 ALR 333 at p 33).

[44] As there is no court order with respect to the recovery of the subject land, there cannot be correspondingly a subsequent order for a mandamus to compel the recovery of the subject land for there is no positive order for the subject land to be so recovered. After all a mandamus may only be ordered to compel a public authority to perform a duty it is legally obligated and not otherwise. See the High Court case of *Tun Dr Mahathir bin Mohamad v Tan Sri Mohd Sidek bin Hassan & Ors* [2018] 7 MLJ 768 where it was held as follows:

> [35] Therefore, under s 44(1) of the SRA, this court may issue an order of mandamus asking the authority to perform a public duty imposed on it where the public duty is prescribed by law. Thus, an order of mandamus can only be granted when there is a legal duty imposed on the public authority, and it does not perform the same.

[45] Not only do the tenets of interpretation of statute do not permit Semantan Estate to argue that s 29(1)(b) of the GPA 1956 is no obstacle to the court granting a mandamus as a follow-up to a declarative order of entitlement to the subject land and its possession, but that case law has been consistent in its interpretation of s 29(1)(b) of the GPA 1956.

[46] The Court of Appeal in *Superintendent of Lands and Surveys, Kuching Division & Ors v Kuching Waterfront Development Sdn Bhd* [2009] 5 MLJ 607, analysed s 29(1)(b) of the GPA 1956 and concluded at p 619 as follows:

> With the presence of the above prevailing statutory prohibition, there was thus no prospect of the respondent recovering possession of the land from the government. With preclusion of the right of recovery of the land in this appeal, and tacitly admitted by the respondent before us, we saw no logical reason why an injunction

(the prohibition of s 29(1)(a) of the GPA aside), should have been granted at all.

[47] The Federal Court once again in *Superintendent of Land and Survey Department Kuching-Divisional Office & Anor v Ratnawati bt Hasbi Mohamad Suleiman* [2020] 2 MLJ 553 ('Ratnawati') in its majority decision, reiterated as follows:

> [121] There is admittedly much attraction in the argument urged for the appellants, and if there is any real substance in these arguments, it would follow that the Court of Appeal was wrong in making the order it did in this section. The order in question is stated to the effect that the subject land is to be reinstated and re-alienated to the respondent by reason of non-compliance with statutory provisions governing inquiry or award of compensation for the land acquired for public purpose. It is clear, in our view, that such order of reinstatement and re-alienation of the subject land to the respondent is akin to an order for recovery of land made against the second appellant which the court is not entitled to grant under s 29(1)(b) of Act 359. The reasoning of the Court of Appeal for the conclusion reached by it in the granting of the declaratory order of reinstatement and re-alienation of the subject land can be gleaned from paras [58]–[62] and [65]–[66] of the judgment. Simply put, based on these paragraphs the Court of Appeal allowed the declaratory orders in favour of the respondent and directed that the subject land to be reinstated on a status quo basis or reverted to its original position prior to the first resumption exercise.
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> [122] Section 29(1)(b) of Act 359 is a plain provision in express terms on a prohibition imposed on the court from granting any order for recovery of land against the government.
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> [123] What is important to note is that the order made by the Court of Appeal goes to the extent of making it explicit that the subject land be reinstated to the respondent or that the subject land be re-alienated to the respondent under s 13 or 15A of the Land Code. It leaves no room for doubt that the order is intended to ensure that the subject land is reinstated or restored to the ownership of the respondent and require the minister to re-gazette a fresh s 48 declaration if the second appellant still needs the subject land for the public purpose.
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> ...
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> *It is indeed pointless for the Court of Appeal to make the order in question when it has no power to make the order in the nature of the recovery of the subject land as against the government because s 29(1)(b) of Act 359 prohibits such order being so made against the government whose servant the first appellant is. The order cannot therefore be allowed to stand.*
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> [124] To set the context, Lord Keith of Kinkel who delivered the judgment of the Pricy Council in the case of *Pemungut Hasil Tanah, Daerah Barat Daya, Penang,* alluded to s 29(1)(b) of Act 359 and proceeded to hold that the said section precludes an order being made against the government for the recovery of the land ... (Emphasis added.)

[48] Semantan Estate drew inspiration from the minority decision in *Ratnawati* at para [70] and tried to prevail upon us that the proviso to s 29(1)(b) of the GPA 1956 should be further qualified to exclude a case 'save where the action concerned a violation of a right guaranteed by the Federal Constitution'. That would be reading into the statute words that are not there.

[49] We cannot think of cases where land had been acquired for breach of other fundamental liberties provisions of the Federal Constitution like breach of right to life in art 5, prohibition against slavery and forced labour in art 6, protection against retrospective criminal laws and repeated trial in art 7, and equality protection in art 8.

[50] Neither can any acquisition of land be in violation of the prohibition of banishment and freedom of movement in art 9, the freedom of speech, assembly and association in art 10 and much less the freedom of religion guaranteed in art 11 and for that matter the rights in respect of education in art 12 of the Federal Constitution. The only violation that one could envisage is for breach of art 13 and in particular art 13(2) where no law shall provide for the compulsory acquisition or use of property without adequate compensation.

[51] We follow the majority in *Ratnawati* not just because of the doctrine stare decisis but also because it is a sensible approach borne out from realities on the ground that at the end of the day the challenge would revolve around the issue of the adequacy of the compensation sum unless there is mala fide in the land acquisition for a purpose other than a public purpose. It would also not be reading s 29(1)(b) of the GPA 1956 with relevant modification to make the acquisition subject to adequate compensation for after all, compulsory acquisition by the relevant acquiring authority is perfectly constitutional for so long as adequate compensation is paid.

[52] The Federal Court in *Orchard Circle Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat & Ors* [2021] 1 MLJ 180 in crisp and clear language observed as follows:

> [39] In our present case, not only that the lands have been taken possession of, by the state authority, it has already been vested in the state authority. Once the lands are vested with the state authority, there are no provisions in the LAA to revert the lands back to the owner.

[53] The argument was taken by Semantan Estate that a judicial review application and for that matter a s 417 of the NLC application is not caught by the term 'civil proceedings' referred to in s 29(1)(b) of the GPA 1956 and so the preclusion against making a mandamus order does not bite.

[54] We look no further than the Federal Court's decision in *Pemungut Hasil Tanah, Daerah Barat Daya (Balik Pulau), Pulau Pinang v Kam Gin Paik & Ors* [1983] 2 MLJ 390 where this argument was addressed pointedly and with precision at pp 395–396 as follows:

> Section 29(1) of the Government Proceedings Ordinance deals with 'any civil proceedings by or against the Government' and the proviso (b) deals with any proceeding 'against the Government for the recovery of land or other property'. It is no answer in our view to say that the notice of motion which resulted in this appeal cannot be described as a civil proceeding against the Government for the recovery of land or other property. It does not follow that the provision of s 29(1)(b) of the Government Proceedings Ordinance is not applicable to this case because of the plain meaning of that section. In fact, that argument would be favourable to the appellant having regard to the provisions of s 8(1) and (3) of the Specific Relief Act 1950 which read as follows:
>
> > 8(1) If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in the suit.
> >
> > (3) No suit under this section shall be brought against any Government in Malaysia.
>
> In the United Kingdom the words 'civil proceedings' have been given a wide meaning. *They refer to all proceedings for the enforcement or vindication or any right or the obtaining of any relief which might previously have been enforced or vindicated or obtained by the proceedings* abolished by the Crown Proceedings Act 1947. See *Halsbury's Laws of England* (4th Edition, Vol 11) at p 752. As our law follows closely the UK Act, the same wide meaning should be given to the words 'civil proceedings' in s 29 of our Government Proceedings Ordinance 1956.

[55] We are not hamstrung in agreeing with the High Court below but on a different ground and the fact that the Government had not filed a notice of appeal to challenge the overall decision in its favour though the High Court's interpretation of the law in some respects was not in its favour, is no hindrance to the Court of Appeal harnessing its wide powers under s 69(5) of the Courts of Judicature Act 1964 as follows:

> (5) The powers aforesaid may be exercised notwithstanding that the notice of appeal relates only to part of the decision, and the powers may also be exercised in favour of all or any of the respondents or parties *although the respondents or parties have not appealed from or complained of the decision.* (Emphasis added.)

[56] This is more so when the specific findings against the Government by the High Court arose out of its interpretation of the law where both parties on appeal had been given ample opportunities to file further submissions before this court. Submissions were made on the applicability of s 29(1)(b) of the GPA 1956. Surely on appeal the Court of Appeal cannot stand by idly when in its

considered opinion the High Court had erred in its apprehension of s 29(1)(b) of the GPA 1956 where its scope and ambit are concerned as well as its interface with art 13 of the Federal Constitution.

[57] Lest it be thought that the provision of s 29(1)(b) of the GPA 1956 would be draconian and that land may be taken surreptitiously and clandestinely by the Government with the land owner being left high and dry, this court shall next consider whether s 29(1)(b) of the GPA 1956, being a pre-merdeka law, may be read in tandem with the entrenched fundamental liberty enshrined in art 13 of the Federal Constitution.

Whether s 29(1)(b) of the Government Proceedings Act 1956 should be read in tandem with art 13 of the Federal Constitution such that there should be a proper assessment as to what is adequate compensation for the subject land acquired

[58] Whilst s 29(1)(b) of the GPA 1956 is silent on adequate compensation where land is concerned, neither does it prohibit adequate compensation from being payable to the party whose land could not be recovered and transferred back to him. The very fact that there was already in existence the Land Acquisition Enactment then with procedural safeguards to ensure fair market value compensation of land acquired for a public purpose underscores the protection that found its way into art 13 of the Federal Constitution which reads:

> Rights to Property
>
> (1) No person shall be deprived of property save in accordance with law.
>
> (2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.

[59] This court also finds its liberty to do so in the light of art 162(6) of the Federal Constitution which enjoins the court to read the provisions of any existing law in operation before Merdeka Day 'with such modifications as may be necessary to bring it into accord with the provisions of the Constitution'. See the Federal Court case of *Assa Singh v Mentri Besar, Johore* [1969] 2 MLJ 30 and the related cases of *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors* [2005] 6 MLJ 289 and *Public Prosecutor v Azmi bin Sharom* [2015] 6 MLJ 751; [2015] 8 CLJ 921.

[60] In *Assa Singh* the Federal Court had no difficulty holding that whilst the Restricted Residence Enactment (Cap 39 of the Laws of the Federated Malay States) does not have provisions similar to art 5(3) and (4) of the Federal Constitution, that does not make it unconstitutional but that it must be applied with such adaptations or modifications as may be necessary to bring it into accord with the Federal Constitution with the result that the safeguards in

art 5(3) and (4) must therefore be read into the provisions of the Restricted Residence Enactment. Suffian FCJ (as he then was) observed with crystal clarity at p 40 para H-I LH that:

> Answering the second part of the question posed, even assuming that the Enactment is inconsistent with the Constitution, I say that the Enactment is not void but that it must be applied with modifications to bring it into accord with the Constitution. *To bring it into accord with the Constitution, there must be read into the Enactment the constitutional rights conferred on an arrested person by art 5.* (Emphasis added.)

[61] In the Court of Appeal case of *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors* [2005] 6 MLJ 289 which concerned the government's acquisition of a land held under customary title, the Court of Appeal in following the approach taken in *Assa Singh* held as follows:

> [37] ... *As regards s 12, it is a pre-Merdeka provision. It must therefore be interpreted in a modified way so that it fits in with the Federal Constitution*. In *Kanda v Government of Malaya* [1962] MLJ 169. Lord Denning when delivering the advice of the Board said:
>
> > In a conflict of this kind between the existing law and the Constitution, the Constitution must prevail. The court must apply the existing law with such modifications as may be necessary to bring it into accord with the Constitution.
>
> ...
>
> [39] The way in which s 12 is to be brought into conformity with the Constitution is to make it yield to art 13(2) which reads:
>
> > 13(2) No law shall provide for compulsory acquisition or use of property without adequate compensation.
>
> [40] That is achieved by not reading the words 'the State Authority may grant compensation therefor' as conferring a discretion on the State Authority whether to grant compensation or not. For otherwise it would render s 12 of the 1954 Act violative of art 13(2) and void because it will be a law that provides for the compulsory acquisition of property without adequate compensation. A statute which confers a discretion on an acquiring authority whether to pay compensation or not enables that authority not to pay any compensation. It is therefore a law that does not provide for the payment of adequate compensation and that is why s 12 will be unconstitutional. *Such a consequence is to be avoided, if possible, because a court in its constitutional role always tries to uphold a statute rather than strike it down as violating the Constitution.* As Jeevan Reddy J said in *State of Bihar & Ors v Bihar Distillery Ltd* AIR 1997 SC 1511:
>
> > The approach of the court, while examining the challenge to the constitutionality of an enactment, is to start with the presumption of constitutionality. The court should to try to sustain its validity to the extent possible. It should strike down the enactment only when it is not possible to sustain it.

> [41] How then do you modify s 12 to render it harmonious with art 13(2)? I think you do that by reading the relevant phrase in s 12 as 'the State Authority shall grant adequate compensation therefor'. By interpreting the word 'may' for 'shall' and by introducing 'adequate' before compensation, the modification is complete. I am aware that ordinarily we, the judges, are not permitted by our own jurisprudence, to do this. But here you have a direction by the supreme law of the Federation that such modifications as the present must be done. That is why we can resort to this extraordinary method of interpretation. (Emphasis added.)

[62] There will be from time to time circumstances arising where there had been some procedural non-compliance with for example in the instant case, the subject land being not properly marked out, measured and a plan made and the land surveyed, the change in the area to be acquired after the relevant *gazette* notification, the hearing being earlier than statutorily prescribed lapse of time from the *gazette* notification and additional area to be acquired and even after parties had already agreed to waive strict compliance with the procedural requirements.

[63] Other times it could be the improper service of the relevant statutory notice of acquisition as in it was served on the wrong party as was the case of *Wong Kee Sing Reality Sdn Bhd & Ors v The Collector of Land Revenue, District of Gombak* [1995] MLJU 187; [1995] 1 CLJU 363 or a failure to serve a notice of inquiry because of a typographical error as was the case of *Superintendent of Land and Survey Department Kuching-Divisional Office & Anor v Ratnawati bt Hasbi Mohamad Suleiman* [2020] 2 MLJ 553.

[64] In *Bayangan Sepadu Sdn Bhd v Jabatan Pengairan dan Saliran Negeri Selangor & Ors* [2021] 1 MLJ 322, the State's system and structure of flood mitigation with its buildings, pipes and pumps were on the land bought by the current proprietor and the State's interest had not been registered against the land. The minority, which was upheld by the Federal Court in *Bayangan Sepadu Sdn Bhd v Jabatan Pengairan dan Saliran Negeri Selangor & Ors* [2022] 1 MLJ 701 held as follows:

> [195] While the law does not require anyone to be altruistic and self-sacrificing, it does require in some instances, like in the present case, that some restrictions may have to be endured for the public good but always that fair compensation be made to anyone who has to so suffer as a result. In the present case it is suffering the structure of the state to be on one's land to serve a public purpose. Article 13 of the Federal Constitution protects and preserves one's property rights as follows:
>
> 13 Rights to property
>
> (1) No person shall be deprived of property save in accordance with law.
>
> [196] To be deprived of use of one's property or any part thereof would be sufficient encroachment that cannot be excused without payment of a reasonable rental and

where parties cannot agree on the amount, it cannot be justified without a fair compensation to be determined by the court.

[65] The Court of Appeal in dealing with land already acquired by the State in *Kelana Megah Development Sdn Bhd v Kerajaan Negeri Johor and another appeal* [2016] MLJU 1649; [2016] 8 CLJ 804 held that the seven plots of land which already become State land acquired for a RAPID project could not be transferred back to the appellant, nevertheless an order for compensation should be made in the pending land reference as follows:

> [28] We shall next turn to consider the declaration sought by the appellant in prayer (1) of their statement of claim which is that the purported acquisition of the seven plots of land was illegal and of no effect. The purpose of the declaration is, quite obviously, to supply a basis for the appellant's claim for the recovery of their seven plots of land and the consequent prayers for damages for trespass. However, *the appellant's prayer (1) is patently an affront against s 29(1)(b) of Act 359.* In such circumstances, prayer (1) is, in our finding, obviously not maintainable either. In any event, even if a declaration in appropriate terms is to be considered in this case, the seven plots of land would continue to remain as state land. *The only remedy available to the appellant would be that of monetary compensation reflective of the appropriate market value of the seven plots of land.* This being the case, the forum for claiming such monetary compensation is the land references. *Any claim for monetary compensation for the seven plots of land in this suit would therefore duplicate the claim within the land references*. Apart from being an abuse of court process and scandalous, a prayer for declaration whether as presently sought or modified is, frivolous and vexatious due to the appellant's pending land references.

[66] In the instant case, the prayer for mandamus to compel the Collector of Land Revenue to complete the acquisition process had failed ultimately in the Supreme Court in Semantan Estate Supreme Court GOJ 1987. What Semantan had been deprived of is the opportunity to challenge the quantum of the compensation sum as is clear from the two letters below.

[67] The first is the letter from the Semantan Estate's solicitors then Shook Lin & Bok to the State Legal Adviser dated 1 August 1958:

> SHOOK LIN & BOK P.O. BOX 766
>
> ADVOCATE & SOLICITORS 80 CROSS STREET,
>
> KUALA LUMPUR
>
> YPH/6161/S. 5853 1st AUGUST, 1958
>
> Sir,
>
> Diplomatic Enclave
>
> C.T. No. 12530 Lot 4647 — Mukim of Batu
>
> ---
>
> We refer to our meeting with you on 23rd July 1958.

2. Our clients have now instructed us to inform you that they agree that all procedural matters should be settled in the manner set out below provided of course Government confirms the agreement.

3. For all purposes, it will be accepted that the whole of the area now taken by Government was acquired by virtue Notification No. 401 published in the Selangor Gazette on the 26th July 1956.

4. Referring to the plan referred to in letter No. 16, in fileDOKL Conf. No. 52/57 dated the 5th May 1958, its to be taken that Area 'A', 'C' and 'D' were acquired under that Notification, and that no proceedings were ever taken in respect of Area 'B'.

5. It is accepted as a basis that of all future proceedings (if any), that the award made by the Collector of Land Revenue in respect of Area 'A', 'C' and 'D' was at the rate of $5, 282/-per acre, in respect of the matters set out in Section 29(i)(a) and (b) of the Land Acquisition Enactment and that our clients 'claim in respect of the same areas under the same subsections of the Enactment was at the rate of $13,000/-per acre.

6. It is a basis of the arrangement that, I addition to the claim abovenamed, our clients are now entitled to make an additional claim under sections 29(i)(c) and/or (d) of the Enactment in respect of severance and/or injurious affection of Area 'B' and the remainder of our clients 'land, such claim arising from the acquisition of Area 'C', which separates Area 'B' and the balance of our clients 'planted land from its factory, smoke house, labour lines, office, etc.

7. Compensation at the rate of $5, 282/-per acre was paid on the 19th day of December, 1956 in respect of 250 acres. Area 'A', 'C' and 'D' total 263.272 acres.

8. It follows therefore that on the arrangement now xxx to further compensation at the rate of $5,282 is payable on an additional 13.272 acres, and we would be grateful if you would confirms that this will now be paid, together with interest at 6% from the 3rd December 1956 the date on which the Collector instructed the Public Works Department to take possession.

9. Finally, it was agreed that the Second acquisition proceedings should be withdrawn by the Government and should be treated by both sides as never having occurred.

10. In case our clients decide to proceed with a Reference to the Court, in connection with the acquisition of the 263.272 acres, we would be grateful if you would confirm that the arrangement between us is as set out above and that Reference should proceed accordingly, it being made by the Collector of Land Revenue on the basis above.

We have the honour to be, Sir

Your obedient servant,

Sd. Shook Lin & Bok

[68] The second is State Legal Adviser's reply to Messrs Shook Lin & Bok dated 5 January 1959:

File No. A.G.F.Y .45/D

L.A.Sel.224

Legal Adviser's

Chambers

Kuala Lumpur. 5th January, 1959

Messrs Shook Lin & Bok

P.O.Box 775

Kuala Lumpur.

Gentlemen,

Diplomatic Enclave

CT. No. 12530 Lot 4047 Mukim of Batu

I have the honour to refer to your letter dated 1st August, 1958, on the above subject and in reply to inform you that I confirm the arrangement set out in your above said letter namely:-

(a) The whole area now taken by Government was acquired by virtue of Notification No. 101 published in the Selangor Government Gazette on 28th July, 1956.

(b) That areas 'A', 'C' and 'D' shown in the plan referred to in letter No. 16 in DOKL.Conf.No.52/57, dated 5th May, 1958 were acquired under O.N.401.

(c) That no proceeding were ever taken in respect of Area 'B'.

(d) That the award made by the Collector of Land Revenue was at the rate or

(e) $5,282/-per acre and that your client's claim in respect of the area was at the rate of $15,000 per acre.

(f) That your client may make an additional claim under Section 29(i)(o) and/or (i)(c) of the Enactment in respect or severance and/or injurious affection.

(g) That compensation at the rate of $5,282/-per acre had been paid on the 18th day of December, 1956 in respect or 250 acres.

(h) That the total area of 'A', 'C' and 'D' is 263.272 acres.

(i) That your client will be paid further compensation at the rate of $5,282/-per acre on the additional 13.272 acres plus 6% interest from the 3rd December, 1956.

(j) That the second-acquisition proceeding would be withdrawn by Government and treated by both sides as never having occurred.

2. I have spoken to the Attorney-General and he agreed with the above arrangement.

3. The delay in replying is regretted.

I have the honour to be,

Gentlemen,

Your obedient servant,

Sgd. Bahaudin bin Mohd Yacob

Legal Adviser

Selangor

[69] Even if it could be argued that Semantan Estate is no longer bound by the said agreement reached because a subsequent High Court in the High Court order 2009 had declared that the acquisition is unlawful, in the light of the preclusion in s 29(1)(b) of the GPA 1956 and the protection of adequate compensation under art 13(2) of the Federal Constitution, this court would make an order for an assessment of adequate compensation for the subject land acquired.

[70] Learned senior federal counsel ('SFC') for the Government argued that if this court were to interpret the High Court order 2009 as entitling Semantan Estate to compensation in lieu of the recovery of the subject land, it would effectively result in a double remedy or double compensation. It was further argued that this would be unfair to the Government, as they were never afforded an opportunity to bring evidence or witnesses to address any other form of damages during the 2003 writ action, as Semantan Estate's claim for damages at that point in time was limited to mesne profits. It was also pointed out that no other form of damages or compensation was pleaded by Semantan Estate.

[71] We do not think that the issue raised by the learned SFC is an insurmountable problem. There is no double recovery as mesne profits is, essentially in the context of this case, damages for unlawful occupation of the subject land. It will continue until full and fair compensation as may be assessed by the court is paid. It cannot continue forever and ever and ever.

[72] It cannot be gainsaid that once Semantan Estate has received the full and fair compensation or the adequate compensation as envisaged in art 13(2) of the Federal Constitution there is no longer anymore unlawful occupation of the subject land. It would be a case then of Semantan Estate having received what it would have been entitled to receive if the acquisition had been properly carried out under the then Land Acquisition Enactment.

[73] It cannot be seriously disputed that with respect to the subject land, what had been developed from what was mainly a rubber estate, all serve a public purpose as was required of an acquisition under s 3(1) of the Land Acquisition Enactment. We can take judicial notice of the buildings, government offices and that of its agencies, roads, flyovers, stadiums, Syariah

Courts and the like that have been built on the subject land.

[74] Granted that no land owner is required to be altruistic and self-sacrificial and that is where when land is acquired for a public purpose, adequate compensation with respect to the market value of the subject land has to be paid to the land owner.

[75] Any delay in compensation paid is covered under s 44 the Land Acquisition Enactment which provided for 'Payment of interest' as follows:

> Payment of interest
>
> When the amount of such compensation is not paid or deposited on or before taking possession of the land, the Collector shall pay the amount awarded with interest thereon at the rate of six per cent, per annum from the time of so taking possession until it has been so paid or deposited.

[76] The Government objected on ground that since Semantan Estate had not prayed for damages in its mandamus application and that the requirements of damages O 53 r 5 of the Rules of Court 2012 ('the ROC 2012') have not been met as follows:

> 5 Damages O 53 r 5
>
> (1) On an application for judicial review the Court may, subject to paragraph (2), award damages to the applicant if —
>
> (a) *he has included in the statement* in support of his application for leave under rule 3 *a claim for damages arising from any matter to which the application relates*; and
>
> (b) the Court is satisfied that, if the claim has been made in an action begun by the applicant at the time of making his application, he could have been awarded damages.
>
> (2) Order 18, rule 12, shall apply to a statement relating to a claim for damages as it applies to a pleading. (Emphasis added.)

[77] We do not see the non-pleading of damages in the O 53 r 3 statement to be fatal for at the heart of the claim is the relief of specific performance and in lieu thereof the court may exercise its discretion to grant damages or compensation instead. It is a case where the claim for a bigger remedy would not foreclose a lesser remedy in damages or compensation. It is no different in the case of a workman that has been dismissed without just cause and excuse under s 20(1) of the Industrial Relations Act 1967 where his remedy in the Industrial Court is for reinstatement to his former employment. The Federal Court in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147 in its majority decision had no compunction when granting a certiorari to quash the award of the Industrial Court in

dismissing the workman's claim for reinstatement, to make an order for compensation in lieu of reinstatement and also back wages.

[78] Though the above decision was before the amendment to O 53 r 5 under the old Rules of the High Court 1980 was effected by PU(A) 342/2000 that eventually found its way into the current O 53 r 5 of the ROC 2012, we do not think that the failure to include a claim for damages or compensation would be a bar to the court granting that relief in a case where the grant of a mandamus is precluded by the law in s 29(1)(b) of the GPA 1956 and more so when the court is dealing with a fundamental liberty protection under art 13(2) of the Federal Constitution.

[79] We are further fortified to grant compensation by drawing an analogy from claims for specific performance involving land and in lieu of specific performance the court may award damages or compensation as allowed under s 18(2) of the Specific Relief Act 1950 which provides as follows:

> (2) If in any such suit the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.

[80] At any rate O 53 r 5 of the ROC 2012 should not be read so as to denude O 53 r 2(3) of its efficacy. O 53 r 2(3) reads as follows:

> Upon the hearing of an application for judicial review, *the Court shall not be confined to the relief claimed by the applicant* but may dismiss the application or make any orders, including an order of injunction or *monetary compensation*:
>
> ... (Emphasis added.)

[81] O 53 r 5 can be read in tandem with and harmoniously with O 53 r 2(3) of the ROC 2012 in that under O 53 r 5, the court in granting the reliefs prayed for may further award damages if the claim for damages have been included in the O 53 statement in O 53 r 3(2). In a case where a court dismisses the judicial review application or where such an application would be academic, it may still under O 53 r 5 make an order for monetary compensation as expressly permitted under O 53 r 2(3) of the ROC 2012.

[82] This court is not hampered or hindered from making an order for compensation to be assessed as we would be acting well-within the broad ambit of O 53 r 2(3) of the ROC 2012 in doing justice to all manner of men in the context where an opportunity to determine what is adequate compensation under art 13(2) of the Federal Constitution had been denied Semantan Estate.

[83] The Federal Court's case of *Empayar Canggih Sdn Bhd v Ketua Pengarah*

Bahagian Penguatkuasa Kementerian Perdagangan Dalam Negeri dan Hal Ehwal Pengguna Malaysia & Anor [2018] supp MLJ 16 is an authority for when damages may not be awarded unless the requirements of O 53 r 5 have been met and not an authority for when compensation may be awarded under O 53 r 2(3) of the ROC 2012. Even then the Federal Court there held that any claim for damages arising out of what the appellant said was a seizure of its machinery and equipment under the Optical Disc Act 2000 should under a private law writ action for damages and not by way of judicial review under O 53 of the then Rules of the High Court 1980.

[84] Alternatively, we find merits in the SFC's submission that this is a fit and proper case for the court to invoke its powers under s 69(4) of the Courts of Judicature Act 1964 which expressly empowers the Court of Appeal to make any order and such further or other orders to prevent injustice as follows:

> (4) The Court of Appeal may draw inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.

[85] One may draw some inspiration from the minority judgment of Gopal Sri Ram JCA (later FCJ) in *Ng Kim Moi (P) & Ors v Pentadbir Tanah Daerah, Seremban, Negeri Sembilan Darul Khusus (Negeri Sembilan Township Sdn Bhd & Anor, proposed intervenors)* [2004] 3 MLJ 301 where the acquisition of the appellants' land was invalid due to non-compliance with mandatory provisions of the Land Acquisition Act 1960 as follows:

> [45] So, the fact that a plaintiff claims the wrong relief or does not claim the correct relief does not bar the court from granting the relief appropriate to the particular circumstances to prevent injustice by acting under the prayer for further or other relief. Thus, in *Lim Eng Kay v Jaafar bin Mohamed Said* [1982] 2 MLJ 156, Salleh Abas FCJ (as he then was) said:
>
> > We cannot see how the respondent should be deprived of his right by a purely technical error on the part of his solicitors, who were not up-to-date with this aspect of legal technicalities. In any case prayer (e) in paragraph (7), 'Any other relief which this Honourable Court deem fit to grant 'must not be treated as a mere ornament to pleadings devoid of any meaning.
>
> [46] Further, this court has ample jurisdiction and power under s 69(4) of the Courts of Judicature Act 1964 to 'make any order which ought to have been given or made, and make such further or other orders as the case requires'. These words which were adopted, with slight inconsequential variation in language, from O 41 r 33 of the Indian Civil Procedure Code 1908 empower this court to do complete justice between the parties. See *Harris Solid State (M) Sdn Bhd & Ors v Bruno Gentil s/o Pereira & Ors* [1996] 3 MLJ 489; *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789 (FC).
>
> [47] Acting on the foregoing authorities, it is plain that this court is empowered to grant the appellants such relief as is appropriate in law to do justice in accordance

with the circumstances of the case. Now, this is a case in which, I have already said, the appellants were deprived of their land in violation of the provisions of the Act. In other words the deprivation here was not in accordance with the provisions of written law and therefore contravenes art 13(1) of the Federal Constitution. That Article reads: No person shall be deprived of property save in accordance with law.

[86] We do not see s 29(1)(b) of the GPA 1956 as undermining the authority of the court or curtailing its judicial powers. Surely a court of law is subject to the law and it cannot arrogate to itself contrary to what Parliament has legislated unless what is legislated is unconstitutional. Otherwise the court would interpret its powers and jurisdiction within the law.

[87] As to the objection that the Government had not been heard on what is adequate compensation that can be addressed by this court remitting the matter to the High Court for assessment of compensation to be paid with directions to the High Court for parties to be given 90 days from today to file their Expert Valuation Report on the market value of the subject land as at the date to be determined by this court below.

Whether the compensation should be the market value as at the date the Government took possession of the subject land or the current market value

[88] We find merits in the learned SFC argument that compensation is to be assessed as at the date the Government took possession of the subject land. It was at that date that Semantan Estate was deprived of its possession of the subject land. That date was 3 December 1956. Section 44 of the Land Acquisition Enactment envisages that.

[89] To have the compensation assessed as at current date would be to reward delay on the part of Semantan Estate as it only filed its High Court 2003 declaration suit in 2003 and obtained the declarative order in 2009. It was only in 2017 that it filed its mandamus application and in 2022 the mandamus application was dismissed.

[90] There was no suggestion that Semantan Estate could not have succeeded in 1956 if it had filed its High Court 2003 declaration suit in 1956 or thereabout. Any delay caused by Semantan Estate in exploring various approaches to challenging the acquisition before it succeeded in the High Court 2009 declaration order cannot be attributed to the Government.

[91] In *Wong Kee Sing Realty Sdn Bhd*'s case Shankar J (later JCA) at para [93] ordered that in respect of the deprivation of the plaintiff's land the defendant do pay compensatory general and special damages for the market value of the Lots at the date the plaintiff lost possession of its land.

[92] In the instant case there is already an on-going assessment exercise under the High Court declaration order 2009 where an order for assessment of mesne profit is being undertaken.

[93] We would therefore dismiss the mandamus appeal but we would remit the matter back to the High Court for assessment of adequate compensation as envisaged in the Land Acquisition Act 1960 taking into account the factors then prevailing in December 1956. The parties are directed to file their Expert Valuation Report on the market value of the subject land as at 3 December 1956 within 90 days from today with the High Court that is currently tasked with assessment of mesne profits of the subject land having regard to the factors as enumerated in the Land Acquisition Act 1960 where relevant. Any further directions in respect of the assessment of compensation on the matter shall be given by the High Court concerned.

[94] The two amounts paid by the Government of RM1,320.500 on 21 December 1956 and another RM79,241.01 on 3 February 1959 shall be deducted from the amount of compensation assessed. Interest shall be at 6%pa as stated in s 44 of the Land Acquisition Enactment from 3 December 1956 to date of payment.

[95] Upon payment of the compensation as assessed the mesne profits shall cease to be payable.

Whether the s 417 of the NLC High order should be set aside

[96] Section 417 of the NLC provides as follows:

> Section 417 General authority of the Court
>
> (1 The Court or a Judge may by order direct the Registrar or any Land Administrator to do all such things as may be necessary to give effect to any judgment or order given or made in any proceedings relating to land, and it shall be the duty of the Registrar or Land Administrator to comply with the order forthwith.
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> (2) Where, pursuant to any order made by virtue of this section, the Registrar or any Land Administrator —
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> (a) cancels any instrument relating to land, or any memorial or other entry on any such instrument, or
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> (b) makes any other amendment of, or addition to, any such instrument, he shall note thereon the reason for the cancellation, amendment or addition, and the date thereof, and shall authenticate the same by his signature and seal.

(3) Where the Registrar or Land Administrator takes action under this section in respect of any land or any share or interest therein, he shall cause notice of his action to be served upon any person or body having a claim protected by caveat affecting the land, share or interest.

[97] The s 417 of the NLC application is essentially for an order for the Registrar of Titles (Federal Territory) to transfer the subject land to Semantan Estate free from all encumbrances and liabilities. The application and relief sought was said to be necessary to give effect to the High Court declaration order 2009. However, there is no positive order for the transfer of the subject land to Semantan Estate. The only positive order is for assessment of mesne profits for which no further order under s 417 of the NLC is needed or necessary.

[98] At the risk of repetition, nowhere in the High Court declaration order 2009 is there an order directing the Registrar of Titles to effect, the transfer of the subject land to Semantan Estate. We cannot read into the High Court declaration order 2009 words that are not there, for otherwise nothing would be impossible and everything is possible! While that mantra is good for human possibilities, we are nevertheless grounded by the hard realities of what is contained in and circumscribed by the High Court declaration order 2009.

[99] The Registrar of Titles cannot do that which the High Court declaration order 2009 is silent. Semantan Estate cannot improve on the said order by subsequently applying for the said transfer of the subject land. If indeed that was what Semantan Estate wanted, there was no good reason to be consciously and carefully coy about it and indeed the High Court 2003 declaration suit stopped short of so asking for the transfer of the subject land to Semantan Estate.

[100] There would, at the very least, have been an express prayer for such a relief to accompany the declarative prayer of it retaining beneficial interest in the subject land and of it being entitled to possession thereof. After all, the worst that could happen would be the court dismissing the prayer for the relief. Its silence is consistent with its submission to the scope and substance of s 29(1)(b) of the GPA 1956 in that such a transfer would not be possible. It is a complete non-starter.

[101] The High Court declaration order 2009 is not an academic order of a High Court with no utility whatsoever. As stated in the order, Semantan Estate was given an order for assessment of mesne profits which could only be possible because of the declaration that it retains beneficial interest in and is entitled to possession of the subject land. As and when it is assessed, the Government would have to pay on pain of execution following the approach enunciated in

Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd [2008] 4 MLJ 641 where the Federal Court held that it is reasonable to expect the Government to act with honour and responsibility as follows:

> [71] Thus it must be brought to bear on the state government that the *GPA is not there to enable the government to flout the law*, it merely provides a special procedure in order to avoid the embarrassment of execution proceeding being taken against the state government. *I think it is reasonable to expect the state government to act with honour and responsibility* and the appellant in the present case is no exception. I do not wish to go into the issue why the state government had acted the way they did in the present case. It is never in dispute that the respondent is in law entitled to the judgment as specified in the certificate ... (Emphasis added.)

[102] In the light of the reasons given above the s 417 of the NLC High Court order cannot stand. A subsequent High Court cannot read into the High Court 2009 order words that are not there and more so when it is not in the dispositive order as sealed and extracted.

[103] The appeal of the Registrar of Land Titles in the s 417 of the NLC appeal is allowed and the High Court order compelling the Registrar of Titles to transfer the subject land back to Semantan Estate is hereby set aside.

[104] In the light of the above decisions the stay appeal of Semantan Estate is hereby dismissed.

[105] As for costs we exercise our discretion and taking into consideration the constitutional dimension of the dispute, we make each party bear their own costs.

POSTSCRIPT

[106] This case is a timely reminder that problems do not disappear into thin air and that some problems are like the proverbial tin can that is being kicked down the road. There is a costs to be paid for indecisiveness and sometimes future generations are made to bear what previous generations have not adequately addressed.

[107] Looking back at the whole broad big picture, this dispute could have been resolved much earlier with all due diligence by all parties. As Virginia Satir, a well-known psychologist said: 'The problem is not the problem but coping is the problem.' May this judgment provide to some extent the certainty and the ability to cope with the consequences and fall-out of one's decision though first taken some seven decades ago.

Wan Ahmad Farid JCA (delivering supporting judgment of the court):

[108] I have had the benefit of reading the draft judgment of my learned brother, Lee Swee Seng FCJ. With respect, I am in complete agreement with the reasoning contained in the grounds of judgment of His Lordship. I would therefore, dismiss the appeal in Appeal No WA-01(A)-668–11 of 2021. The appeal in W-01(NCVC)(A)-519–08 of 2024 is allowed the High Court order compelling the Registrar of Titles to transfer the subject land back to Semantan Estate is hereby set aside. The stay appeal of Semantan Estate is hereby dismissed.

[109] I would however, like to add one small point. It is this.

[110] The order dated 29 December 2009 made by Zura Yahya JC, was affirmed by the Court of Appeal on 18 May 2012.

[111] There were two attempts made by the Government of Malaysia — first, to seek leave to appeal to the Federal Court, which was refused on 21 November 2012. Unperturbed, the Government of Malaysia sought to review the said refusal, which was made under r 137 of the Rules of the Federal Court 1995. This review application was also denied by the Federal Court on 22 November 2018.

[112] Allow me to revisit the relevant parts of the order dated 29 December 2009 made by the learned JC. They are as follows:

> 1. The Plaintiff retained its beneficial interest in the 263.272 acres of the land held under CT 17038 Mukim of Batu (formerly part of the land known as Lot 4647 comprised in C.T 12530) of which the Defendant has through its servants and/or agents taken unlawful possession of and that the Plaintiff is entitled as against the Defendant to possession thereof.
>
> 2. That the Defendant do pay the Plaintiff mesne profits as damages for trespass, the said damages to be assessed by the Senior Assistant Registrar.

[113] I have gone through the sealed copy of the order of the learned JC with the proverbial fine-tooth comb. I take cognisance of the following:

(a) there is no order made by the learned JC for the subject land to be transferred to Semantan Estate (1952) Sdn Bhd;

(b) there is no evidence before this court that Semantan Estate had sought clarification from the learned JC as to whether the subject land ought to be transferred and registered by the Federal Lands Commissioner to Semantan Estate as a consequential order. In short, there was no attempt made to 'work out' the order so as to give effect to the initial order. It is

to be recalled that 'liberty to apply' rule for consequential order is implied in every court order; *Stone World Sdn Bhd v Engareh (M) Sdn Bhd* [2020] 12 MLJ 237 (FC). Semantan Estate did not exercise this right at the material time;

(c) the first remedy (para 1) allowed by the Zura Yahya JC is that Semantan Estate retained its beneficial interest in the subject land. The sealed copy of the order stopped short of directing that the subject land to be transferred and registered to and in the name of Semantan Estate;

(d) what then, is a beneficial interest? It is trite that if one holds a beneficial interest in an immovable property, he can only enjoy the benefit from the same. He has no registered interest in the land. However, he can still enjoy the benefit or profit from the land where he has a beneficial interest; and

(e) since Semantan Estate retained the beneficial interest in the subject land, the learned JC was entirely correct in making a further order in para (2) that the company is entitled to mesne profit to be assessed by the High Court, which order was affirmed by the Court of Appeal.

[114] It is for these reasons that the learned High Court judge in Appeal No W-01(NCVC)(A)-519–08 of 2024 had fallen into an appealable error that warrants a curial intervention. The learned judge in Appeal No 519 should not have made an order for the subject land to be transferred and registered in the name of Semantan Estate when there was no such order stated in the sealed copy of the order dated 29 December 2009 made by Zura Yahya JC, nor was there any clarification sought by Semantan Estate at the material time before the learned JC.

[115] The transfer order by the learned judge under s 417 of the National Land Code is therefore set aside.

Mandamus appeal dismissed and matter remitted back to High Court for assessment of adequate compensation; s 417 NLC appeal allowed; stay appeal dismissed; each party to bear their own costs.

Reported by Dzulqarnain Ab Fatar